Supreme Court, U.S.
FILED
OCT 5 2000
OFFICE OF THE CLERK

No. 00-527

IN THE

Supreme Court of the United States

WALKER COUNTY SCHOOL DISTRICT,
Petitioner,

v.

JENSINE BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES L. WEATHERLY
KATHLEEN A. SULLIVAN
THE WEATHERLY LAW FIRM
Monarch Plaza
Suite 450
3414 Peachtree Road, N.E.
Atlanta, GA 30326
(404) 262-9500

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for the Petitioner

October 5, 2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

161pp

QUESTION PRESENTED

In a civil action challenging a state administrative decision under the Individuals with Disabilities Education Act, the district court "shall receive the records of the administrative proceedings," "shall hear additional evidence at the request of a party," and "shall grant such relief as [it] determines is appropriate" based on "the preponderance of the evidence." 20 U.S.C. § 1415(i)(2)(B).

The question presented is whether, in an IDEA proceeding, section 1415(i)(2)(B) requires the district court to hear evidence otherwise admissible under the Federal Rules of Evidence if requested to do so by a party or whether, as the court of appeals held, the district court has broad discretion to refuse to hear evidence on a variety of policy grounds, including that similar testimony was, or could have been, admitted in the state administrative hearing.

PARTIES TO THE PROCEEDING

There are no petitioners other than the one named in the caption. The respondents other than the one named in the caption are John Bennett and Denise Bennett. The other parties in the proceeding below were the Walker County Board of Education, and Jewel Campbell, Charles Helton, Mack Hunt, Margaret Johnson and Sarah McKinley, not individually, but as members of the Walker County Board of Education. See Sup. Ct. R. 14.1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ABOUT THE MEANING OF THE REQUIREMENT THAT DISTRICT COURTS REVIEWING IEP DETERMINATIONS CONSIDER ADDITIONAL EVIDENCE	11
II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT	13
III. THE COURT OF APPEALS' CONSTRUCTION OF THE IDEA IS WRONG	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 15

Astoria Fed. Sav. & Loan Ass'n v. *Solimino*, 501 U.S. 104 (1991) 15

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. *Rowley*, 458 U.S. 176 (1982) ..... *passim*

Capistrano Unified Sch. Dist. v. *Wartenberg*, 59 F.3d 884 (9th Cir. 1995) 11

Indep. Sch. Dist. No. 283 v. *S.D.*, 88 F.3d 556 (8th Cir. 1996) 11

Kirkpatrick v. *Lenoir County Bd. of Educ.*, 216 F.3d 380 (4th Cir. 2000) 13

Leon v. *Mich. Bd. of Educ.*, 807 F. Supp. 1278 (E.D. Mich. 1992) 14

Mayson v. *Teague*, 749 F.2d 652 (11th Cir. 1984) 14

Metro. Bd. of Pub. Educ. v. *Guest*, 193 F.3d 457 (6th Cir. 1999) 12

Metro. Gov't of Nashville & Davidson County v. *Cook*, 915 F.2d 232 (6th Cir. 199 .....9, 12, 17

Monticello Sch. Dist. v. *George L.*, 102 F.3d 895 (7th Cir. 1996) 11

Ojai Unified Sch. Dist. v. *Jackson*, 4 F.3d 1467 (9th Cir. 1993) 11

Springer v. *Fairfax County Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998) 11

Town of Burlington v. *Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985) 8, 11

Univ. of Tenn. v. *Elliott*, 478 U.S. 788 (1986) 15

Susan N. v. *Wilson Sch. Dist.*, 70 F.3d 751 (3d Cir. 1995) 12

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES — Page

Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 3
5 U.S.C. § 706(2)(A) 14
20 U.S.C. § 1232g(b) 16
§ 1400 *et seq.* 3
§ 1400(d)(1)(A) 3
§ 1414(d) 3
§ 1415 ..... *passim*
42 U.S.C. § 2000e *et seq.* 15

STATE STATUTES AND REGULATION

Ga. Code Ann. § 24-9-21 (2000) 16
§ 24-9-40 *et seq.* (2000) 16
§ 43-39-16 (2000) 16
Ga. Comp. R. & Regs. r. 616-1-2-.38 (1999) 16

RULES

Fed. R. Civ. P. 2 17
Fed. R. Evid. 402 18
403 18

SCHOLARLY AUTHORITY

Terry Jean Seligmann, *Not As Simple As ABC: Disciplining Children With Disabilities Under The 1997 IDEA Amendments*, 42 Ariz. L. Rev. 77 (2000) 13

OTHER AUTHORITY

Merriam Webster's Collegiate Dictionary (10th ed. 1996) 17

IN THE

Supreme Court of the United States

No. 00-

WALKER COUNTY SCHOOL DISTRICT,
Petitioner,

v.

JENSINE BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Walker County School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) was entered on February 16, 2000, and is reported at 203 F.3d 1293 (11th Cir. 2000). The order denying the petition for rehearing and rehearing *en banc* (App. 134a-35a) was entered on June 7, 2000, and is not reported. The opinion and final order of the United States District Court for the Northern District of Georgia (App. 12a-54a) were entered on February 25, 1999, and are not reported. Earlier opinions and orders of the District Court in this case were entered on January 29, 1998 (App. 110a-33a); May 22, 1998 (App. 108a-09a); and July 29, 1998 (App. 79a-107a), and are not reported. The

opinion of the Administrative Law Judge of the Georgia Office of State Administrative Hearings (App. 55a-78a) was entered on February 10, 1997, and is not reported.

JURISDICTION

The court of appeals entered its decision and judgment on February 16, 2000. Petitioners timely filed a petition for rehearing and a suggestion for rehearing *en banc* on March 8, 2000, and rehearing was denied on June 7, 2000. On August 24, 2000, petitioners timely filed an application for an extension of time to file the petition for certiorari in this case; Justice Kennedy granted petitioner's application and allowed petitioner until October 5, 2000 to file the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(2), which provides as follows:

> (2) Right to bring civil action
>
> (A) In general
>
> Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional Requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.[1]

STATEMENT OF THE CASE

1. Pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*, Congress makes federal funds available to state and local education entities. In turn, those entities are required to identify children with disabilities and to develop for each disabled student an annual individualized education program or IEP that will provide the child a "free appropriate public education." See 20 U.S.C. §§ 1400(d)(1)(A), 1414(d). Under this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), an IEP provides a free, appropriate public education if the state has complied with the procedures set forth in the IDEA and if the IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. If the parents of a disabled child are not satisfied with the IEP, the IDEA requires the education agency to conduct an impartial due process hearing. 20 U.S.C. § 1415(f). Any party aggrieved by the result of the state's administrative proceedings—*i.e.*, either the parents or the school district—

---

[1] The IDEA was substantially revised and reorganized in 1997, but the provisions pertinent to this appeal were not changed. *See* Individuals With Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37. The court of appeals thus cited the statute in its present form, and this petition does the same.

has the right to bring a civil action in state court or federal district court. *Id.* § 1415(i)(2).

2. Jensine Bennett was born on September 15, 1988, and identified as an autistic child in 1991, when she was three. App. 4a. She and her parents live in Walker County, Georgia. *Id.* The Walker County School District determined that Jensine was a child with a disability, due to her autism, and therefore that she qualified for special educational services under the IDEA. *Id.* The School District prepared IEPs for Jensine, and they were implemented without dispute during Jensine's preschool years, 1991-92 through 1994-95. *Id.*

In the spring of 1995, the School District prepared a proposed IEP for Jensine for the 1995-96 school year. That IEP was rejected by the Bennetts on the grounds that it did not provide a long enough extended program for the summer months, did not require occupational therapy services, and did not provide sufficient one-on-one classroom assistance. App. 4a. The Bennetts ultimately withdrew Jensine from the School District's system, enrolled her in a private school for autistic children, and notified the School District that they intended to seek reimbursement of the costs of the private schooling. *Id.*

In July 1996, the Bennetts requested a due process hearing under the IDEA. They argued that the proposed IEP did not afford Jensine a free appropriate public education as required by the IDEA and therefore that they were entitled to reimbursement for Jensine's private schooling during the 1995-96 school year. App. 5a.

3. An Administrative Law Judge was assigned to hear the case under Georgia's statutory scheme. The School District sought certain documents and other discovery related to Jensine's year of private schooling, but the State's statutory scheme does not provide for discovery and the Bennetts

would not voluntarily make any information about Jensine available to the School District. Indeed, the School District was not able to obtain, even by subpoena, the private school's records, the testimony of the private school's employees, or the testimony of Jensine's in-state evaluator prior to the hearings.

After conducting a hearing, the ALJ issued his decision in February 1997. App. 55a-78a. He held that the proposed IEP did not provide Jensine with a free, appropriate public education because it did not provide an adequate behavior management program, occupational therapy, services for a full twelve months, and communication aids. Accordingly, the ALJ ordered that the Bennetts be reimbursed for Jensine's private schooling during the 1995-96 school year. *Id.* at 77a.

4. As a party aggrieved by the decision, the School District filed a complaint in federal district court under the IDEA on March 12, 1997. Pursuant to section 1415(i)(2)(B)(ii), which provides that the court "shall hear additional evidence at the request of a party," the School District notified the court that it intended to present "additional evidence." App. 3a-6a.

In response, the court observed that "[t]he Eleventh Circuit has not yet expressed an opinion as to the proper meaning to be given the phrase 'additional evidence,' and a difference of opinion exists among the other circuit courts":

> The First, Seventh, and Ninth Circuits have adopted restrictive definitions of the word "additional," and have construed the term to mean "supplemental." . . . The Sixth Circuit, however, has repudiated the idea that "additional evidence is admissible only in limited circumstances, such as to supplement or fill in the gaps in the evidence previously introduced." Instead, the Sixth Circuit construes the terms "additional" in the following manner:
>
> > "Additional," in its ordinary usage, implies something that is added, or something that exists by way

> of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add."
>
> The Sixth Circuit's interpretation of the term "additional" thus permits the district court to consider not only evidence that "supplements" the administrative record, but also any other evidence that is relevant to the proceedings. [App. 120a-21a (citations omitted).]

The district court concluded that "the Sixth Circuit's interpretation of the term 'additional evidence'" was "persuasive" and that it was "inclined to apply the interpretation adopted by the Sixth Circuit in reviewing future motions for the admission of additional evidence, unless Defendants can convince the Court otherwise by citing appropriate authority." App. 121a. The court then denied the School District's motion to submit additional evidence as premature and required the School District to make a proffer of the evidence it wished to present at the conclusion of discovery. *Id.*

On June 15, 1998, the School District filed its motion for the consideration of additional evidence. In that motion, it provided the court with a list of witnesses (whose testimony would be presented by personal appearance, deposition, or affidavit) and three categories of tangible or documentary evidence that it would introduce. It showed that this evidence was "relevant to the proceedings," as the court had required.

The district court ruled on the motion on July 29, 1998. It once again laid out the conflict among the courts of appeals on the "proper meaning to be given the phrase 'additional evidence.'" App. 88a. But, in this decision, the court stated that "[a]fter further reflection," it would "clarif[y] its position to emphasize that the Court does not believe that the broader interpretation of the term 'additional' adopted by the Sixth Circuit entitles a party to an unlimited opportunity to introduce additional evidence on review of the administrative hearing officer's decision," because that "effectively would

permit parties seeking a review . . . to obtain a trial *de novo* in the district court." *Id.* at 88a-89a. The district court therefore adopted a new standard, purporting to combine the Sixth Circuit's approach with the restrictive approach employed by the First Circuit and those following it. After articulating this standard, the court refused to consider virtually all of the School District's additional evidence on the grounds that the proposed witnesses "(1) previously testified at the administrative hearing; (2) did not testify at the administrative hearing, but were available to testify at the administrative hearing; or (3) will offer testimony that is identical to testimony previously offered by other witnesses at the administrative hearing." *Id.* at 90a. The lone exception to the court's exclusion of the School District's additional evidence was the deposition testimony of a single witness, Lee Ann Shelton, concerning Jensine's progress at her private school after the date of the administrative hearing. *Id.* at 96a-97a. In denying the School District's motion for reconsideration, the district judge stated that "the Court did not 'guarantee' that the Court would use a particular standard when determining whether to admit additional evidence." R7-50-7.

On February 9, 1999, after the School District was permitted to respond to the new standard by providing a specific description of one category of documents whose admission had been denied, the court entered an order permitting the School District to introduce certain additional documents related to Jensine's enrollment in private school. App. 32a. The court did *not* permit the School District's proffered lay and expert testimony regarding the significance of the private school records in demonstrating that its proposed IEP did provide a free, appropriate public education. Nor did the court allow cross-examination of witnesses regarding these records which had been unavailable during the administrative proceedings.

On February 25, 1999, the district court entered its final order in this case. It explained that it would "review the administrative record and the additional evidence" and "render a decision on the parties' appeal from [the] administrative decision based on a preponderance of the evidence." App. 34a. The court found that the ALJ had clearly erred when he compared the relative merits of the private school and public school plans for Jensine, when he should have been independently evaluating the appropriateness of the public school program. *Id.* at 45a. Nonetheless, the court ultimately affirmed the ALJ's decision that "the 1995-96 IEP was not reasonably calculated to provide Jensine with educational benefit," because "[it] did not contain a provision concerning increased one-on-one instruction"; "failed to provide adequate procedures for addressing Jensine's self-abusive behavior"; and failed to provide a long enough summer program. *Id.* at 46a-47a. The court concluded that the private school was an appropriate placement for Jensine, and ordered that the Bennetts' costs for 1995-96 be reimbursed. *Id.* at 51a.

5. The court of appeals affirmed. It identified the critical issue as "[w]hat standard should be applied in deciding what 'additional' evidence, if any, should be admitted in the district court proceeding." App. 7a. It described the "leading decision" as *Town of Burlington* v. *Department of Education*, 736 F.2d 773 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985). There, the court "construe[d] 'additional' in the ordinary sense of the word to mean supplemental." *Id.* at 790 (internal citation omitted). The Eleventh Circuit "agree[d] with this well reasoned resolution of the issue by the First Circuit" and "align[ed itself] with the Seventh and Ninth Circuits in adopting the same holding." App. 10a (citing cases). The court further characterized the Third and Eighth Circuits as adopting "restrictive approach[es]" to the issue without adopting *Town of Burlington*.

The court of appeals recognized that *Town of Burlington* had been rejected by the Sixth Circuit in *Metropolitan Government of Nashville & Davidson County* v. *Cook*, 915 F.2d 232 (6th Cir. 1990), but, with little explanation, characterized the distinction between the tests as "more semantical than substantive." App. 11a. Then, the court stated without elaboration that applying its construction of the statute, the district court acted within its discretion in excluding most of the additional evidence proffered by the School District. *Id.* On the merits, the court of appeals simply affirmed the district court's decision holding that the proposed IEP did not provide Jensine with a free, appropriate public education without any discussion. *Id.*

REASONS FOR GRANTING THE PETITION

Every year school districts across the nation prepare thousands of IEPs. Numerous administrative challenges to those IEPs are filed annually in the 50 state administrative systems that process IEP challenges. Those systems offer widely varying amounts of process to parents and school districts in disputes about the appropriateness of IEPs. When those disputes make their way to court, however, the IDEA, a federal statute, sets forth the process for bringing a civil action with respect to the state's decision approving or disapproving an IEP. Accordingly, in court, a single set of procedural rules should govern in IDEA cases.

That is not, however, the reality today. There is an acknowledged conflict among the courts of appeals on what constitutes "additional evidence" that courts must consider in deciding whether an IEP provides a free, appropriate public education within the meaning of the IDEA. See 20 U.S.C. § 1415(i)(2)(B)(ii). The First Circuit, followed by the Fourth, Seventh, Eighth, Ninth and now the Eleventh Circuits, has adopted a restrictive view of the meaning of the phrase

"additional evidence," while the Sixth Circuit and the Third Circuit employ a much broader construction.

The uniform and proper interpretation of this provision of the IDEA is critical to its fair and effective functioning. The federal rights of students, parents, and school districts should not receive less protection simply because those individuals and entities live in Georgia rather than in Ohio. Moreover, the IDEA reflects a congressional determination that *courts* are to reconcile and balance the federal interest in ensuring that disabled children have appropriate IEPs with the state interest in deciding which educational policies, practices and approaches will be used to educate disabled children. See *Rowley*, 458 U.S. at 207-08. Courts can only do so if they have all relevant evidence before them and if they engage in *de novo* decision making, and the IDEA provides for both. But that purpose is subverted, and judicial oversight cannot be effective, if the phrase "additional evidence" is given the rigid, narrow definition adopted by the court below and the other circuits that follow *Town of Burlington*. The importance of this issue is further highlighted by its recurrent nature: Numerous IEPs are challenged every year.

Finally, the decision below is wrong. It ignores the plain meaning, legislative history, and purpose of the statute. It substitutes the review provided under the Administrative Procedure Act for the civil action and *de novo* consideration of a full record mandated by Congress and embodied in Spending Clause legislation.

This Court should grant the petition to resolve the conflict among the federal courts of appeals on this recurring question and to ensure the proper, fair, and effective administration of an important federal statute.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ABOUT THE MEANING OF THE REQUIREMENT THAT DISTRICT COURTS REVIEWING IEP DETERMINATIONS CONSIDER ADDITIONAL EVIDENCE.

In this case construing section 1415(i)(2) of the IDEA, the Eleventh Circuit chose to follow the decision of the First Circuit in *Town of Burlington*. It therefore held that the IDEA requirement that, in a civil action challenging a state administrative IEP decision, a district court "shall hear additional evidence at the request of a party" means only that the district court may, in its discretion, hear "supplemental" evidence proffered by a party. See *Town of Burlington*, 736 F.2d at 790 ("[w]e construe 'additional' in the ordinary sense of the word to mean supplemental") (citation omitted); *id.* at 791 ("[t]he determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*"). In so doing, the Eleventh Circuit joined the Fourth, Seventh and Ninth Circuits which employ the *Town of Burlington* standard. See *Springer* v. *Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir. 1998); *Monticello Sch. Dist.* v. *George L.*, 102 F.3d 895, 901 (7th Cir. 1996); *Ojai Unified Sch. Dist.* v. *Jackson*, 4 F.3d 1467, 1473 & n.7 (9th Cir. 1993); *Capistrano Unified Sch. Dist.* v. *Wartenberg*, 59 F.3d 884, 889 (9th Cir. 1995). Cf. also *Indep. Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 560 (8th Cir. 1996) (requiring the party seeking to submit "additional evidence" to provide notice to the court and a "solid justification" for expansion of the administrative record).

In marked contrast, the Sixth Circuit has expressly declined to adopt the approach of the First Circuit and hold that "additional evidence is admissible only in limited

circumstances, such as to supplement or fill in gaps in the evidence previously introduced." *Cook*, 915 F.2d at 234. Instead, that court applies the statute's plain meaning, saying:

> "Additional," in its ordinary usage, implies something that is added, or something that exists by way of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add." [*Id.*]

See also *Metro. Bd. of Pub. Educ.* v. *Guest*, 193 F.3d 457, 463 (6th Cir. 1999) (reaffirming *Cook* and explaining that it "adopted a broad interpretation of the term 'additional'" in its interpretation of the "statutory mandate to accept additional evidence"). And, without expressly adopting *Cook*, the Third Circuit reversed a district court decision summarily excluding the consideration of additional evidence and held that, in reviewing IEP decisions, the district court should consider any evidence that will "assist the court in ascertaining whether Congress' goal has been, and is being reached for the child involved." *Susan N.* v. *Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995). See *id.* (explaining that, on remand, the district court must consider "evidence relevant, non-cumulative and useful in determining whether Congress' goal has been reached"). This standard for consideration of "additional evidence" is at least as broad as that set forth in *Cook*.[2]

The difference between the approaches adopted in *Town of Burlington* and *Cook* is substantial and important. For example, here the School District sought to present the testimony of witnesses who had not appeared in the state administrative proceeding, and their testimony was excluded under the *Town of Burlington* test simply because *other*

---

[2] The court of appeals below cited *Susan N.* as adopting a restrictive approach to the meaning of the phrase "additional evidence," but, as the description in text and a fair reading of the opinion reveal, this is wishful thinking.

witnesses in the state administrative proceeding had already testified on the same topic or because these witnesses could have been called during the state administrative proceeding and were not. App. 88a. Similarly, in the federal action, the School District sought to cross-examine individuals who had testified during the state administrative proceeding based on documents that had not previously been available due to the lack of discovery at the administrative level. This, too, was not permitted. Under the *Cook* test, much of the School District's proffered evidence would have been considered, and the district court could have fulfilled its statutory mandate to consider "additional evidence" when requested and to conduct the *de novo* proceeding required under this Court's decision in *Rowley*, 458 U.S. at 205.

Due to the unique nature of the IDEA and the judicial process that it mandates, "there appears to be confusion as to the exact nature of the IDEA proceedings before the district courts." *Kirkpatrick* v. *Lenoir County Bd. of Educ.*, 216 F.3d 380, 385 & n.4 (4th Cir. 2000). See also Terry Jean Seligman, *Not As Simple As ABC: Disciplining Children With Disabilities Under The 1997 IDEA Amendments*, 42 Ariz. L. Rev. 77, 127 n.30 (2000) (describing the conflict among the courts of appeals on the "circumstances under which they will hear additional evidence"). This Court should grant the petition to resolve the conflict among the circuits on this important and oft-recurring question.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

Every year school districts prepare thousands of IEPs; every year parents challenge many of those IEPs in state administrative proceedings, and these disputes are ultimately the subject of litigation in federal district court. In virtually every such case, the district court must consider whether to

admit "additional evidence." The legal issue presented in this case is certain to recur frequently.

The resolution of this question is also critically important to the fulfillment of Congress' purpose in crafting the judicial proceedings under the IDEA. In crafting the IDEA, Congress sought to balance its interest in funding free, appropriate education for disabled students with its intent to leave decisions about education policy, practices and approaches with the states. *Rowley*, 458 U.S. at 200-04, 207-08. To ensure that its decision about the appropriate balance was properly and uniformly carried out, Congress created a unique proceeding for judicial action in response to state administrative decisions about IEPs.

The initial decision whether an IEP is lawful is made by a state administrative agency. Federal courts generally review the decisions of administrative agencies based solely on the administrative record and under the well established arbitrary-and-capricious standard of review. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The IDEA provides a fundamentally different approach. It allows a great deal of variation in the states' administrative proceedings,[3] and places the judiciary in an important oversight role. Specifically, the Act authorizes parties aggrieved by the result of a state administrative proceeding not to appeal or to file a petition for review, but to bring a "civil action." 20 U.S.C. § 1415(i)(2)(A). In such an action, the court "receive[s]" the administrative record, but the Act also provides that the court "*shall* hear additional evidence at the request of a party," shall "bas[e] its decision on the preponderance of the

---

[3] For example, in Georgia, the administrative hearing officers are attorneys, while in other states the role is filled by educators. *See, e.g.*, *Mayson* v. *Teague*, 749 F.2d 652 (11th Cir. 1984) (approving the use of educators not involved in developing a child's IEP or a state IEP policy as hearing officers); *Leon* v. *Michigan Bd. of Educ.*, 807 F. Supp. 1278 (E.D. Mich. 1992) (noting the use of attorneys).

evidence," and "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(B)(ii) & (iii) (emphasis supplied). This Court has explained that, although the administrative agency findings are entitled to "due deference," the civil action is considered "*de novo*." *Rowley*, 458 U.S. at 205.[4]

In this context, the court of appeals' restrictive definition of the phrase "additional evidence" is manifestly contrary to the purpose of the IDEA's civil action provisions. These provisions do not call for traditional review of agency action, but for traditional judicial action on a civil claim after discovery under the Federal Rules of Civil Procedure and the consideration of all relevant evidence. Congress deemed such a scheme necessary to protect the balancing of state and federal interests in the IDEA, and its mandate that judges create and then rule on a full record is demonstrably undermined by a crabbed construction of the phrase "additional evidence." Cf. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S 104, 113-14 (1991) ("our reading of the [Age Discrimination in Employment Act] will provide no more than a second chance to prove the claim, and even then state administrative findings may be entered into evidence at trial. It also may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment").

---

[4] Judicial proceedings under the IDEA are thus analogous to judicial proceedings under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 (1974) (where an employee's discrimination claim has been the subject of arbitration with a high level of procedural fairness, the court must "consider the employee's claim *de novo*" and "accord [the arbitral decision] such weight as the court deems appropriate"). *Cf. Univ. of Tenn.* v. *Elliott*, 478 U.S. 788, 795-96 (1986) (holding that state administrative agency findings do not have a preclusive effect in Title VII proceedings before the EEOC or in federal court and that such claimants are entitled to trial *de novo*).

The court of appeals' approach also will result in fundamental unfairness for children, parents, and school districts in some states. Many states, including Georgia, allow limited or no discovery in administrative proceedings, see Ga. Comp. R. & Regs. r. 616-1-2-.38 (1999); or have laws making certain types of records confidential, see Ga. Code Ann. §§ 24-9-21(5)-(8), 24-9-40 *et seq.*, 43-39-16 (2000). See also 20 U.S.C. § 1232g(b) (confidentiality of education records). In such states, the administrative record may be incomplete, and the federal civil action may be a party's first opportunity to discover evidence and incorporate that evidence into its case. In this case, for example, the School District was unable to subpoena out-of-state witnesses for deposition or testimony at the administrative hearing or to discuss certain confidential records with third-party witnesses. Yet, applying the court of appeals' narrow definition of "additional evidence," a court can refuse to consider such evidence in a direct case or for use in cross-examination on the grounds that other witnesses provided similar testimony in the administrative proceeding or that a witness has already testified and been cross-examined. See, *e.g.*, App. 88a. These state-by-state variations in administrative proceedings were meant to be smoothed away by the civil actions provided for in the Act.[5]

Finally, the court of appeals' approach will have the undesirable consequence of turning administrative proceedings about IEPs into pitched battles. If courts are less likely to admit and consider "additional evidence," then the parties will have to ferret out and incorporate into the administrative record all evidence supporting their arguments and countering those of their opponents. In addition, parties who would not otherwise have hired attorneys for an administrative

---

[5] Indeed, all states must have in place administrative proceedings to air and resolve disputes about IEPs on a tight 45-day timeline, 20 U.S.C. § 1415, making the statutory safety net that provides for discovery, additional evidence, and full consideration even more important.

proceeding (generally, parents) will have to do so to protect their rights. The structure of the IDEA, however, strongly indicates that Congress intended to allow states to conduct formal or informal administrative proceedings, secure in the knowledge that judicial oversight would protect the federal balance of interests embodied in the Act.

The issue presented by this case is important and recurring and this Court's review is therefore warranted.

III. THE COURT OF APPEALS' CONSTRUCTION OF THE IDEA IS WRONG.

The statutory provision at issue states that aggrieved parties "shall have the right to bring a civil action" and that, in such an action, the court "*shall* hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(A) & (B)(ii) (emphasis supplied). The IDEA expressly provides that a court action under the IDEA is a "civil action" in the usual sense of the term—*i.e.*, not an appeal or a petition for review based on an administrative record. See Fed. R. Civ. P. 2 ("[t]here shall be one form of action to be know as 'civil action'").[6]

The statutory language also clearly requires the courts to admit and consider evidence that is not in the administrative record upon the request of a party. It does not restrict or limit a party's evidentiary presentation. To the contrary, the word "shall" expresses "what is mandatory." *Merriam Webster's Collegiate Dictionary* 1076-77 (10th ed. 1996). The word "additional" is used to describe those things "existing by way of addition" or "increase." *Id.* at 13. See also *Cook*, 915 F.2d at 234 ("'additional', in its ordinary usage, implies something that is added, or something that exists by way of addition. To 'add' means to join or unite; the limitation on what can be

---

[6] Compare these provisions with other sections of the IDEA authorizing only appeals, *e.g.*, 20 U.S.C. § 1415(i)(1)(A).

joined inherent in the term 'supplement' is not present in the term 'add'"). And the phrase "at the request of a party" carries a strong implication that it is the court's discretion to deny admission that is being restricted. The plain language of the statute is therefore directly contrary to the narrow construction adopted by the court below and all other courts following the *Town of Burlington* standard. Under this provision, federal courts may exclude evidence only on the grounds that it does not satisfy the generally applicable requirements that it be relevant and not be needlessly cumulative. See Fed. R. Evid. 402, 403.[7]

The language mandating judicial oversight based on a full record receives support from the legislative history. The original bill for the IDEA approved by the House of Representatives made the findings of fact of a state administrative hearing officer "conclusive." This provision was eliminated in the final version of the IDEA, and replaced with current statutory language. See *Rowley*, 458 U.S. at 205 ("[i]n substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make 'independent decisions based on a preponderance of the evidence'") (quoting S. Conf. Rep. No. 94-455, at 50 (1975)).

Finally, we showed above that the Eleventh Circuit's construction of the IDEA contravenes the congressional policy and purposes embodied in the civil action provision, see *supra* at 15, and we will not repeat that argument here. A

---

[7] The Eleventh Circuit's holding that a district court has "broad discretion" to decide what is "additional evidence" is not consistent with the language of the Act and is "less than faithful to [the courts'] obligation to construe what Congress has written . . . by concluding that Congress had imposed upon the [parties] a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." *Rowley*, 458 U.S. at 190 n.11.

broad interpretation of the "additional evidence" provision is required not only by the language and legislative history of the statute, but also by the congressional purposes to be served by the IDEA's authorization of a judicial action.

The court of appeals has wrongly construed an important federal statute and, in so doing, has deepened an already mature conflict among the courts of appeals. This Court should grant the petition to correct this error and end the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES L. WEATHERLY
KATHLEEN A. SULLIVAN
THE WEATHERLY LAW FIRM
Monarch Plaza
Suite 450
3414 Peachtree Road, N.E.
Atlanta, GA 30326
(404) 262-9500

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for the Petitioner

October 5, 2000

* Counsel of Record